No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION,
Appellant,

vs.

ITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, A CORPORATION, HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED, FULTON COUNTY BANK OF McCONNELSBURG, PA., A CORPORATION, AND DR. LOUIS D. HYDE,
Appellees.

AND

HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED,
Appellant,

vs.

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Appellees.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

REPLY BRIEF FOR APPELLANTS.

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May It Please The Court:

It is a universal rule that courts of equity exercise a peculiar and all inclusive jurisdiction over trusts. We do not argue the merits when we call attention to the fact that on the face of this record a trust is involved. Complaint is made in Appellee's Brief that we have attempted to argue the merits; and it is insisted that the nature of the case and the state of the record are not facts and circumstances which are properly to be considered when the court has before it a motion to dismiss for want of prosecution.

The ultimate fact is that an order of dismissal disposes of the particular case. The court cannot and will not be blind to the effect of that dismissal. That effect depends upon the nature of the proceeding. Here there is a trust fund actually in existence, partially distributed by order of court, with the balance in *custodia legis*. The duties and obligations, as well also the rights, of the trustee are questions presented by the pleadings. That is true even though such defendant trustee has not filed a cross bill seeking affirmative relief.

The proceedings before the court were instituted by bondholders, as beneficiaries, against the City of Wolf Point as trustee, with other bondholder beneficiaries made defendant. It is not a suit by a creditor against a debtor, or by an injured party against one guilty of tort. The questions involved are not merely the liability of the city for money but a determination of its rights and duties. Those questions interest not merely the plaintiff and the defendant city; the other defendants are affirmatively interested.

It has been urged in Appellee's Brief that the defendant City of Wolf Point has asked no affirmative relief and is not interested in a decree, even though such decree be fav-

orable to such city in many respects. We insist that a trustee cannot take that position. A trustee will never be permitted to benefit by its own wrongdoing. It will no more be permitted to benefit by nonfeasance than by misfeasance. Admittedly there is a present fund of money, as well also delinquent special assessments to be collected, which are to be distributed to the beneficiaries of such funds. Those are facts and circumstances which the court cannot ignore. Counsel for appellee urge that such facts and circumstances are irrelevant and that the only fact which can be considered upon a motion to dismiss is the lapse of time. This is a proceeding in equity, and a court in the exercise of chancery jurisdiction will never ignore fundamental equities.

Preliminary to specific discussion of the points raised in Appellee's Brief, we desire to emphasize both the nature of the question before the court and how that question is presented. Should this particular case have been dismissed for want of prosecution? Courts, particularly when sitting in equity, do not invoke penalties and punishments merely to exercise jurisdictional powers. The right of the court to dismiss for want of prosecution will not be exercised without careful consideration of both the reasons for and the effect of such order.

The rule to show cause was entered January 10, 1939, on the court's own motion (Record 91). That rule was returnable and came on for hearing on January 21, 1939. The record discloses that the attorney for plaintiff was in court, presenting oral objections to dismissal; and an answer in behalf of defendant bondholders was filed (Record 92, 96). The record does not disclose that the defendant City of Wolf Point was present at such hearing or in any way participated (Record 96). Certainly, defendant city took no affirmative action.

While the record does not disclose the nature of oral objections, there is a written answer in the form of an affidavit. The reasons presented by such answer were not disputed, by countervailing affidavit or otherwise, at the hearing before the District Court. The affidavit of H. C. Hall filed almost five months later (Record 146) was not considered by the District Court and is no proper part of this record. This appeal can only be heard upon the proper record now before this court. Counsel for appellants most respectfully insist that the answer to the rule to show cause, filed in behalf of defendant bondholders, presented the reasons for the delay. When those reasons are considered in connection with the record before the District Court, they constitute a sufficient answer. Counsel for appellants accordingly urge that the rule to show cause should have been dismissed, or at the most Judge Baldwin should have required the presentation of the findings, conclusions and decree to Judge Pray.

Counsel for appellee, in his statement of the case, intertwines argument, based in part on that portion of the printed record which has no proper place therein. Such statement is clearly intended to induce the conclusion by the court that it should ignore the record except only as to the lapse of time. There is no rule of law, and no decisions have been presented or can be found, to the effect that lapse of time alone is conclusive. We shall now address ourselves to the several points presented by Appellee's Brief, taking such points in order of number, as follows:

I.

We invite consideration of the several cases cited in this part of Appellee's Brief. We are unable to discern that any of such cases bear such an analogy to the case at bar

as to make the decisions of value here. Indeed, some appear to have no real pertinency. For example, counsel for appellee declares (Brief 6): "In reaching its determination, the Appellate Court cannot consider the merits of the action", citing *Pueblo De Taos* v. *Archuleta,* 64 Fed. (2d) 807, and *Superior Oil Company* v. *Superior Court* (Cal.) 6 Cal. (2d) 113, 56 Pac. (2d) 950. Those cases are not in point on the proposition stated. So likewise the case of *State Savings Bank* v. *Albertson,* 39 Mont. 414, 102 Pac. 692, does not support the particular claim made for it. However, we invite attention to such latter case because the court there said, just as we here contend, that: "Mere lapse of time is not sufficient in itself to justify a dismissal"; and the decision further pointed out that the trial court might consider any fact as a reason for denying a motion to dismiss, including that the defendant may have acquiesced in or caused the delay.

II.

Counsel for appellee quotes rule designated 48-3 wherein it is provided that a cause may be dismissed for want of prosecution. Numerous cases cited in our original brief sustain the proposition that any such rule neither adds to nor detracts from the power of the court. If such rule now exists (since the adoption of the Rules of Civil Procedure), it is at most a warning signal, but not a mandatory requirement.

Counsel says that the rule is a proper one and should be enforced, with citation of two cases. Neither of such cases relates to the particular rule, and, indeed, the questions involved in such cases do not include a rule of similar purport. So likewise the several other cases cited by counsel in this section of Appellee's Brief do not relate either to

the rule in question or to any similar rule. All of them involve only the general proposition of the power of the court to dismiss for want of prosecution, and all of them were decided according to the particular facts involved in each case.

Counsel dismisses appellant's proposition that the City of Wolf Point has not been injured upon the basis that injury will be presumed. A California case is cited wherein the defendant had made a motion to dismiss and the court merely held that the burden did not fall on the moving party to affirmatively show injury. California decisions must be examined from the standpoint of special statutes. In the numerous cases relating to dismissal for want of prosecution, it will be found that almost invariably the moving party does allege prejudice. Generally speaking, that prejudice relates to the original trial of a case with production of witnesses. In the case at bar we have no such situation because the record has been closed as to the testimony of witnesses.

Counsel for appellant regret the necessity for correcting a misstatement, and a wrong intimation resulting therefrom, which are repeatedly made in appellee's brief. Under statement of the case (Appellee's Brief page 2) it is pointed out that the record does not disclose who filed the findings of fact, conclusions of law and decree, or that they were ever submitted to Judge Baldwin. Then the statement is found (Appellee's Brief page 9), as follows:

> "The return day was January 21, 1939 (R. pp. 91, 92). It is apparent that no findings, conclusions or decree was entered (Brief p. 7), *or presented* (Brief p. 14), to the court on that day, for at that time counsel for appellants obtained and was granted 'leave to submit proposed findings of fact and conclusions' (R. p. 96). *This he failed to do.*"

Under part IV of Appellee's Brief (page 15) it is further stated:

> "But no findings, conclusions or decree were then before the court, for Mr. Foor, on that date, obtained and was granted leave 'to submit proposed findings of fact and conclusions in connection with the request therefor contained in said answer to order to show cause' (R. pp. 96, 97).
>
> "Not until February 10th, 1939, was anything done with reference to such 'findings, conclusions and decree.' On that date they were 'lodged with the clerk of the court'" (R. p. 97).

We feel that it is clearly improper for appellee's counsel to make the statement that Mr. Foor failed to present such findings, conclusions or decree. One of the counsel for appellee was in court on January 21, 1939, and has personal knowledge of the fact that Mr. Foor tendered such findings, conclusions and decree to Judge Baldwin on that date; and as a result of such tender, in order to record the same, the memorandum order was entered granting leave to submit.

It will be noted that the case was not continued from January 21st to a date certain, but on the contrary was taken under advisement by Judge Baldwin. Thereafter, on February 10, 1939, and without notice of any kind, as appears from the record, the order of dismissal was filed and entered by Judge Baldwin. It is apparent from the record that none of the counsel representing any of the parties to the case were present before the court on such last named date.

The record of the District Court recites as follows (Record 97): "Thereafter, on February 10, 1939, *proposed* findings of fact and conclusions of law were lodged with the clerk of this court," and again (Record 115):

"Thereafter proposed decree was lodged with the clerk of this court." When the case was not on hearing on said date and no parties were before the court, we urge not only that it is the fair and reasonable interpretation, but a necessary interpretation of the record, that such findings of fact, conclusions and decree were lodged with the clerk by Judge Baldwin.

The statement that Mr. Foor failed to submit such findings, conclusions and decree, pursuant to the leave granted, has no basis in the record and is clearly erroneous. The intimations are very apparent that the appellants again failed to take any action. Such intimations are wholly unwarranted. The court is not justified in forming the conclusion, apparently desired by counsel for appellee, that such documents were not presented to Judge Baldwin. Perhaps Appellee's Brief was not written by the one of its counsel who was present before Judge Baldwin on January 21, 1939, and on that theory the misstatements and intimations are inadvertent. The ultimate fact is that the findings, conclusions and decree were tendered to Judge Baldwin in open court on January 21st, and were in his possession until by him lodged with the clerk on February 10, 1939.

III.

In this section of Appellee's Brief it is asserted that the dismissal is proper under the Montana statute. That cannot be seriously contended. Even though our federal courts, in suits at law, follow the practice of the state courts, it has been repeatedly held that in equitable proceedings federal courts follow the practice established by the Supreme Court. The case at bar was filed as a bill in equity and comes clearly within the federal practice pertaining thereto.

The District Court unquestionably had the power to act in accordance with a sound judicial discretion. That discretion should be exercised in accordance with those principles applying to federal courts of equity. State statutes are not in any sense controlling. We are not here concerned with the particular language of the Montana statutes. The reference to Montana cases, in appellant's original brief, was only directed to one point, namely, that even under such statutes there was a liberal interpretation and the language was not always construed as mandatory. Counsel for appellee attempts to distinguish, but we trust that the court will examine the cases cited.

It is urged that statutes of limitation are applied in federal courts, at least by analogy. The cases cited have no bearing on any such statute as is here invoked by appellee. Even statutes of limitation are not necessarily and always followed in courts of equity, at least the statutes of a State by a Federal Court.

In our original brief at pages 16 and 17 we pointed out that certain documents were filed in the District Court approximately five months after the dismissal, but were included in the record (Record 143-146). Appellee's Brief now endeavors to justify such filing because the attorney for plaintiff filed an affidavit after the dismissal, although before notices of appeal were given (Record 121). It will be noted that appellant has not made reference to such affidavit of Arlie M. Foor and has not relied upon anything contained therein. The appellants in this case include one of the plaintiffs and one of the defendant bondholders, and counsel represent both such parties. We endeavored to carefully refrain from putting anything into our original brief which was not predicated upon the proper record. This court has before it for review the order of dismissal entered on February 10, 1939, and it

is only the record as of that date which can properly be considered.

IV.

We have heretofore answered, under part II, this section of Appellee's Brief. In general the same subject matter is treated on pages 9 and 15 of Appellee's Brief.

Counsel does say that no action was taken between January 10th and January 21st, 1939. Believing as we do that it is improper to take any action involving a conflict of jurisdiction between judges of the same court, counsel for appellant could not at that time present the findings, conclusions and decree to Judge Pray. From the moment when the rule to show cause was issued on January 10th, that particular phase of the case was before Judge Baldwin. There would have been a distinct conflict created, if Judge Pray had then entertained a motion for the entry of a decree.

Counsel for appellee expressly recognizes that the establishment of findings of fact and conclusions of law with the entry of a decree was wholly within the jurisdiction of Judge Pray. Counsel for appellants would have been very much at fault if they had tried to start a race to determine which order should be entered first.

V.

The bald statement is made that no excuse appears why the decree was not entered. As a matter of fact the appellants responded to the rule to show cause with both written and oral presentation of the reasons for the delay. We believe those reasons fully justified upon a consideration of the entire record.

This is not the usual case of a failure to prosecute a lawsuit where the issue is yet to be determined, perhaps before a jury, upon the testimony of witnesses. On the contrary, the case has been fully tried. All parties have had every opportunity to present whatever evidence was necessary. If a trust is involved, and that is true upon the face of the record, then the city has a fiduciary relationship to the beneficiaries. Courts of equity will not permit trusts to fail or lapse. This court cannot and will not ignore those general principles relating to the jurisdiction of courts of equity in the matter of trusts.

The cases cited by counsel in this section of Appellee's Brief (page 18) again do not support the proposition as stated. In no one of such cases is it held that the court cannot or should not consider the nature of the case upon the merits or the status of the record. The case of *Superior Oil Company* v. *Superior Court,* 6 Cal. (2d) 113, 56 Pac. (2d) 950, has been cited at least three times (see pages 6, 18, 19). From a careful reading thereof we are unable to understand any connection with the case at bar.

VI.

A reading of the entire decision in *State ex rel. Stiefel* v. *District Court,* 37 Mont. 298, 96 Pac. 337, will disclose that it has no bearing on the question here at issue. Counsel for appellee quote from the case apparently in an attempt to justify the next paragraph of their brief, but the claim there made is utterly fallacious. It is said (Appellee's Brief 20) that through the delay the appellants propose to collect interest on diverted funds for the intervening period from the date of the Master's Report to the date of the decree when entered. The Master's Report specifically names the amount for which judgment should be

entered. Any attempt to increase the amount for which judgment might be entered, over and above the amount named in the Master's Report, would be a reopening of the case. Any allowance for interest as a part of the judgment is a question addressed solely to the equitable powers of the court. Appellants cannot add interest to their claim by their own act, and the charge made, that by the delay appellants are attempting to mulct the city, is wholly without justification. While interest accrues on a judgment, it is only after the entry thereof.

VII.

Counsel for appellee urge that the suggestion of conflicting authority and jurisdiction between the two judges of the District Court is an afterthought. The answer filed to the rule to show cause concluded with the insistence that there should be "entered of record in proper form, pursuant to the rules of this court (1) findings of fact and conclusions of law, and (2) decrees" (Record 95). That could only be done by Judge Pray, who had heard the case, both under general equitable procedure and under the rules, particularly Rule 70½ of Rules of Equity or Rule 52 of Rules of Civil Procedure.

The rule to show cause was pending before Judge Baldwin and the answer thereto urged certain action which could only be taken by Judge Pray. There would appear to be no other logical way to suggest to Judge Baldwin that the appropriate action was to transfer the case to Judge Pray unless the rule be discharged.

It is further insisted that the action of Judge Baldwin did not conflict in any way with the jurisdiction of Judge Pray in this case. The record shows that this case was filed to the Great Falls Division, and all orders and pro-

ceedings therein were before Judge Pray, until entry of the rule to show cause at Havre on January 10, 1939. There is nothing in this record to show that the case was ever transferred or assigned to Havre. There is no explanation in this record to indicate why Judge Baldwin, sitting at Havre, was acting in the case. Judge Pray had entered an order approving the Master's Report which made findings, conclusions, and recommendations for a decree on the merits. Such order is made abortive and is actually set aside by the order of dismissal. We submit that the exercise of judicial discretion in the matter of dismissal for want of prosecution would very aptly come within the province of the judge who had entered such order and was fully familiar with the proceedings and the nature and status of the case.

This is not a question of power or jurisdiction as such. Rather it is expressed as a rule of comity. The fact that the question of dismissal had never been presented to Judge Pray, hence that Judge Baldwin was not acting to review or overrule on that specific point, is not material. This much is true beyond dispute, that Judge Pray had announced a decision on the merits and the entry of a decree thereon was solely in his power. Any other order, or any other proceedings in the case, should have been a matter within the discretion of Judge Pray.

CONCLUSION.

This appeal is solely from an order entered by the Honorable James H. Baldwin dismissing the case for want of prosecution. We have not questioned either the power or the jurisdiction of said judge. We do submit that the entry of such order was not in accordance with the exercise of sound judicial discretion.

The case had been fully tried. The court had announced a decision substantially confirming a Master's report. The case involved a trust. There had been in part a judicial administration of that trust, a partial distribution of funds having been ordered by the Court. The defendant City of Wolf Point had a fiduciary relationship to bondholders, and the rights, as well as the duties and obligations of the city, were to be determined by the decree. It was a part of the duty of the city to bring the trust to a conclusion, and to that end it was equally the duty of the city to have entered a final decree.

By Rule 52 (a) of the present Rules of Civil Procedure (in force September 16, 1938), it is expressly provided that the adopted findings of the Master shall be the findings of the court. There was no such provision in the Rules of Equity previously existing, but Rule 70½ thereof (first adopted October 1, 1930) did require the adoption of findings of fact and conclusions of law. Counsel for appellee refused to consent to an order adopting the Master's Report as the findings and conclusions of the court; they refused to approve the extended findings and conclusions prepared by appellants' counsel; and they never offered any substitute or any definite objections (Record 92-95). Not only did appellee acquiesce in the delay in entry of a final decree but participated therein. The City of Wolf Point, holding trust funds for distribution with duties to perform, nevertheless hindered rather than expedited a termination of the matter.

We must assume that in January, 1939, the Rules of Civil Procedure governed the action of the District Court. The only rule therein relating to dismissal for want of prosecution is number 41 (b) which provides only that on motion of a defendant the cause might be dismissed, and with prejudice unless otherwise ordered. It will be noted

that the only provision in the Rules of Equity for dismissal was in Rule 57 (which was not included in the Rules of Civil Procedure), and then the dismissal was without prejudice. We do not intend to question the power of the court to protect itself and order a dismissal in a proper case. Nevertheless, we strongly urge that the very nature of Rule 41 (b) of Rules of Civil Procedure, and the failure of the United States Supreme Court to make any other provision for dismissal, makes it the more imperative that any dismissal by the court on its own motion shall be entirely free from any possible question or abuse of discretion.

We most respectfully submit that the order of dismissal in this case should be reversed and the cause remanded for further appropriate action.

Arlie M. Foor,
Robert N. Erskine,
Counsel for Appellants.